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10 Attorneys for Defendants K-M Industries  
 11 Holding Co. Inc.; K-M Industries Holding Co.  
 12 Inc. ESOP Plan Committee; and CIG ESOP  
 13 Plan Committee

14 **UNITED STATES DISTRICT COURT**

15 **NORTHERN DISTRICT OF CALIFORNIA**

16 **SAN FRANCISCO DIVISION**

17 THOMAS FERNANDEZ and LORA  
 18 SMITH, individually and on behalf of a  
 19 class of all others similarly situated,

20 Plaintiffs,

21 v.

22 K-M INDUSTRIES HOLDING CO., INC.;  
 23 K-M INDUSTRIES HOLDING CO. INC.  
 24 ESOP PLAN COMMITTEE; WILLIAM E.  
 25 AND DESIREE B. MOORE REVOCABLE  
 26 TRUST; ADMINISTRATOR OF THE  
 27 ESTATE OF WILLIAM E. MOORE,  
 28 DECEASED; CIG ESOP PLAN  
 COMMITTEE; and NORTH STAR TRUST  
 COMPANY,

Defendants.

) Case No. C06-07339 MJJ  
 )  
 ) AMENDED ANSWER OF  
 ) DEFENDANTS K-M INDUSTRIES  
 ) HOLDING CO., INC., K-M  
 ) INDUSTRIES HOLDING CO. INC.  
 ) ESOP PLAN COMMITTEE AND  
 ) CIG ESOP PLAN COMMITTEE TO  
 ) COMPLAINT

)

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Defendants K-M Industries Holding Co., Inc. ("KMH"), K-M  
 Industries Holding Co. Inc. ESOP Plan Committee ("the KMH Plan") and CIG

1 ESOP Plan Committee ("the CIG Plan") hereby amend their answer to the  
 2 allegations contained in the Complaint (the "Complaint") filed on November 29,  
 3 2006, by plaintiffs Thomas Fernandez and Lora Smith (collectively, "Plaintiffs"),  
 4 as follows:

5 **ANSWER TO ALLEGATIONS REGARDING JURISDICTION AND**  
 6 **VENUE**

7 1. KMH, the KMH Plan and the CIG Plan admit that Plaintiffs purport  
 8 to bring this action pursuant to Title I of ERISA, and admit that the Complaint  
 9 purports to seek injunctive, equitable and other relief. KMH, the KMH Plan and  
 10 the CIG Plan lack sufficient information to form a belief as to the truth or falsity of  
 11 the balance of Plaintiffs' allegations concerning their purpose in filing the  
 12 complaint and therefore deny them. Except as specifically admitted, KMH, the  
 13 KMH Plan and the CIG Plan deny the allegations of Paragraph 1.

14 2. Admitted.

15 3. KMH, the KMH Plan and the CIG Plan admit that one or more of  
 16 the Defendants may be found in this District, admit that the employee benefit plan  
 17 at issue is administered in San Carlos, California and deny that any events or  
 18 omissions occurred in this District or elsewhere that give rise to any valid claims  
 19 (asserted in this action or otherwise). Except as specifically admitted, KMH, the  
 20 KMH Plan and the CIG Plan deny the allegations of Paragraph 3.

21 **ANSWER TO ALLEGATIONS REGARDING INTRA-DISTRICT**  
 22 **ASSIGNMENT**

23 4. KMH, the KMH Plan and the CIG Plan admit that "the employee  
 24 benefit plan at issue is administered in San Carlos, California." Except as  
 25 specifically admitted, KMH, the KMH Plan and the CIG Plan deny the allegations  
 26 of Paragraph 4.

## ANSWER TO ALLEGATIONS REGARDING PARTIES

5. KMH, the KMH Plan and the CIG Plan admit that Plaintiff Thomas Fernandez has been a participant in the KMH Plan or the CIG Plan, and further admit that he was employed by CIG from about July 1996 until about October 2005. Except as specifically admitted, KMH, the KMH Plan and the CIG Plan are without information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 5, and therefore deny these allegations.

6. KMH, the KMH Plan and the CIG Plan admit that Plaintiff Lora Smith has been a participant in the KMH Plan or the CIG Plan, and further admit that she was employed by CIG from about September 1996 until about October 2001. Except as specifically admitted, KMH, the KMH Plan and the CIG Plan are without information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 6, and therefore deny these allegations.

7. KMH, the KMH Plan and the CIG Plan admit that KMH was the Sponsor of the KMH Plan, that at some or all relevant times, KMH was the Administrator of the KMH Plan and that under Section 18(2)(A) of the KMH Plan, the Board of Directors of KMH was responsible for appointing the members of the KMH Plan Committee. Except as specifically admitted, KMH, the KMH Plan and the CIG Plan are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 7, and therefore deny these allegations.

8. Admitted.

9. KMH, the KMH Plan and the CIG Plan admit that under the terms of the KMH Plan, KMH and the KMH Plan Committee were "named fiduciaries" with respect to, and limited to, certain aspects of the management and operation of the Plan, as set forth in the Plan itself. KMH, the KMH Plan and the CIG Plan

1 also admit that at some relevant times, William E. Moore was the sole member of  
2 the Plan Committee for the KMH Plan and was a trustee and settler of the Moore  
3 Trust. Except as specifically admitted, KMH, the KMH Plan and the CIG Plan are  
4 without knowledge or information sufficient to form a belief as to the truth or  
5 falsity of the allegations in paragraph 9, and therefore deny these allegations.

6 10. KMH, the KMH Plan and the CIG Plan admit that William E.  
7 Moore founded Kelly-Moore Paint Co., that he died on November 21, 2004, that  
8 until the time of his death, Mr. Moore was Chairman of KMH, and that Mr. Moore  
9 was a trustee and settler of the Moore Trust. KMH, the KMH Plan and the CIG  
10 Plan also admit that Mr. Moore was a "party in interest" as alleged, and that Mr.  
11 Moore, as a member of the KMH Plan Committee, had and exercised such  
12 discretionary authority as was specifically described in the KMH Plan. Except as  
13 specifically admitted, KMH, the KMH Plan and the CIG Plan deny the allegations  
14 in Paragraph 10.

15 11. KMH, the KMH Plan and the CIG Plan admit that at some times  
16 prior to the effective date of the KMH Plan, the CIG ESOP Plan Committee was  
17 Administrator of the CIG Plan, and that the CIG ESOP Plan Committee was a  
18 named fiduciary of the CIG Plan, with fiduciary duties relating and limited to those  
19 discretionary responsibilities specifically set forth in the CIG Plan. KMH, the  
20 KMH Plan and the CIG Plan also admit that at some relevant times, Mr. Moore  
21 was the sole member of the CIG Plan Committee, that Mr. Moore was a trustee  
22 and settler of the Moore Trust and that the CIG Plan was merged into the KMH  
23 Plan on or about July 16, 1999. Except as specifically admitted, KMH, the KMH  
24 Plan and the CIG Plan are without information sufficient to form a belief as to the  
25 truth or falsity of the allegations in Paragraph 11, and therefore deny these  
26 allegations.

12. KMH, the KMH Plan and the CIG Plan admit that at some time  
 2 after Mr. Moore ceased to act as Trustee of the KMH Plan, North Star became the  
 3 KMH Plan's Trustee, and that as KMH Plan Trustee, North Star was a Plan  
 4 fiduciary respecting and limited to those discretionary duties and functions  
 5 specifically described in the KMH Plan. Answering further, KMH, the KMH Plan  
 6 and the CIG Plan allege that North Star became the KMH Plan Trustee in April  
 7 2003, more than a year prior to Mr. Moore's death. Except as specifically  
 8 admitted or alleged, KMH, the KMH Plan and the CIG Plan are without  
 9 information sufficient to form a belief as to the truth or falsity of the allegations in  
 10 Paragraph 12, and therefore deny these allegations.

11 13. Admitted.

### 12 ANSWER TO ALLEGATIONS REGARDING FACTS

#### 13 Company History

14. Admitted.

15. KMH, the KMH Plan and the CIG Plan admit that in the 1960's and  
 16 1970's, Kelly-Moore manufactured products that contained asbestos provided by  
 17 Union Carbide Company, and admit that in the Union Carbide litigation, KMH  
 18 presented an analysis suggesting that the then-pending asbestos litigation  
 19 represented a potential threat to KMH's future viability. Except as specifically  
 20 admitted, KMH, the KMH Plan and the CIG Plan deny the allegations of  
 21 Paragraph 15.

22. KMH, the KMH Plan and the CIG Plan admit that in 1985, Kelly-  
 23 Moore Paint Co. purchased the outstanding shares of Calmutual Insurance  
 24 Company, the predecessor to California Insurance Group. Except as specifically  
 25 admitted, KMH, the KMH Plan and the CIG Plan are without information  
 26 sufficient to form a belief as to the truth or falsity of the allegations in Paragraph  
 27

16, and therefore deny these allegations.

17. KMH, the KMH Plan and the CIG Plan deny the allegations of the  
 first sentence of Paragraph 17, and otherwise admit the allegations of Paragraph  
 17.

18. Admitted.

19. KMH, the KMH Plan and the CIG Plan admit that KMH sued  
 Union Carbide in Texas on claims related to materials containing asbestos which  
 Union Carbide had earlier supplied to Kelly-Moore Paint Co. Except as  
 specifically admitted, KMH, the KMH Plan and the CIG Plan are without  
 information sufficient to form a belief as to the truth or falsity of the allegations in  
 Paragraph 19, and therefore deny these allegations.

#### **ESOP History**

20. Admitted.

21. Admitted.

22. Admitted.

#### **ESOP Transactions**

23. KMH, the KMH Plan and the CIG Plan admit that William Moore  
 acted on behalf of the Moore Trust in connection with transactions alleged in the  
 Complaint. Except as specifically admitted, KMH, the KMH Plan and the CIG  
 Plan are without information sufficient to form a belief as to the truth or falsity of  
 the allegations in Paragraph 23, and therefore deny these allegations.

24. KMH, the KMH Plan and the CIG Plan admit that on or about  
 October 13, 1998, the Paint Plan purchased approximately 33,745,455 shares of  
 KMH Series P stock from the Moore Trust at approximately \$6.88 per share, for a  
 total purchase price of approximately \$232 million. KMH, the KMH Plan and the  
 CIG Plan also admit that the Paint Plan borrowed approximately \$232 million

1 from KMH to fund the purchase of Series P stock. Answering further, KMH, the  
2 KMH Plan and the CIG Plan allege that in connection with the above purchase of  
3 KMH Series P stock, a valuation of the Kelly-Moore Paint Company, Inc. was  
4 done by an independent expert. Except as specifically admitted, KMH, the KMH  
5 Plan and the CIG Plan are without information sufficient to form a belief as to the  
6 truth or falsity of the allegations in Paragraph 24, and therefore deny these  
7 allegations.

8 25. KMH, the KMH Plan and the CIG Plan deny the allegations of  
9 Paragraph 25.

10 26. KMH, the KMH Plan and the CIG Plan deny the allegations of  
11 Paragraph 26.

12 27. KMH, the KMH Plan and the CIG Plan deny the allegations of  
13 Paragraph 27.

14 28. KMH, the KMH Plan and the CIG Plan deny the allegations of  
15 Paragraph 28.

16 29. KMH, the KMH Plan and the CIG Plan deny the allegations of  
17 Paragraph 29.

18 30. KMH, the KMH Plan and the CIG Plan admit that the valuation  
19 report prepared in connection with the October 13, 1998 transaction does not  
20 contain a reference to a discount attributable to the fact that the stock purchased by  
21 the Paint Plan was tracking stock rather than ordinary common stock. Except as  
22 specifically admitted, KMH, the KMH Plan and the CIG Plan are without  
23 information sufficient to form a belief as to the truth or falsity of the allegations of  
24 Paragraph 30 and therefore deny these allegations.

25 31. KMH, the KMH Plan and the CIG Plan admit that in October 1999,  
26 the KMH ESOP purchased approximately 8,400,000 shares of KMH for  
27  
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1 approximately \$55 million and that the KMH Plan borrowed more than \$54  
2 million from KMH to fund the purchase. Answering further, KMH, the KMH Plan  
3 and the CIG Plan allege that in connection with the above purchase of KMH Class  
4 I-B stock, a valuation of the KMH Class I-B stock was made by an independent  
5 expert. Except as specifically admitted, KMH, the KMH Plan and the CIG Plan  
6 deny the allegations of Paragraph 31.

7 32. KMH, the KMH Plan and the CIG Plan admit that an independent  
8 expert valuation of the KMH Class I-B stock concluded that it was worth \$3.66 per  
9 share as of December 31, 1999 and that this value was approximately 56% of the  
10 appraised value of shares in connection with October 1999 transaction. Except as  
11 specifically admitted, KMH, the KMH Plan and the CIG Plan deny the allegations  
12 of Paragraph 32.

13 33. KMH, the KMH Plan and the CIG Plan deny the allegations of  
14 Paragraph 33.

15 34. KMH, the KMH Plan and the CIG Plan deny the allegations of  
16 Paragraph 34.

17 35. KMH, the KMH Plan and the CIG Plan deny the allegations of  
18 Paragraph 35.

19 36. KMH, the KMH Plan and the CIG Plan deny the allegations of  
20 Paragraph 36.

21 37. KMH, the KMH Plan and the CIG Plan deny the allegations of  
22 Paragraph 37.

23 38. KMH, the KMH Plan and the CIG Plan deny the allegations of  
24 Paragraph 38.

25 39. KMH, the KMH Plan and the CIG Plan admit that William E.  
26 Moore acted on behalf of the Moore Trust in connection with the transactions  
27  
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1 involving the acquisition of Series P and Series I tracking stock by the Paint Plan  
2 and the KMH Plan. Answering further, KMH, the KMH Plan and the CIG Plan  
3 allege that there were other persons involved in the transactions that acted on  
4 behalf of the Paint Plan and the KMH Plan. Except as specifically admitted,  
5 KMH, the KMH Plan and the CIG Plan are without information sufficient to form  
6 a belief as to the truth or falsity of the remaining allegations in Paragraph 39, and  
7 therefore deny these allegations.

8 40. KMH, the KMH Plan and the CIG Plan deny the allegations of  
9 Paragraph 40.

10 41. KMH, the KMH Plan and the CIG Plan deny the allegations of  
11 Paragraph 41.

12 42. KMH, the KMH Plan and the CIG Plan admit that no valuations of  
13 the Series I and Series P stock held by the KMH Plan were made during the 2003  
14 and 2004 Plan Years, and admit that Summary Annual Reports were not provided  
15 to Plan participants during those years. Answering further, KMH, the KMH Plan  
16 and the CIG Plan allege that in 2005, valuations of the Series I and Series P stock  
17 held by the KMH Plan were made as of 2003 and 2004. Except as otherwise  
18 admitted, KMH, the KMH Plan and the CIG Plan deny the allegations of  
19 Paragraph 42.

20 43. KMH, the KMH Plan and the CIG Plan admit that the valuation  
21 reports for KMH Series I stock as of December 31, 2000 and December 31, 2001  
22 do not specifically mention potential asbestos-related liability. KMH, the KMH  
23 Plan and the CIG Plan further admit that the valuation report assessing the value of  
24 KMH Series I stock as of December 31, 2002 does mention potential asbestos-  
25 related liability. Except as otherwise admitted, KMH, the KMH Plan and the CIG  
26 Plan deny the allegations of Paragraph 43.

1 44. Admitted.

2 45. KMH, the KMH Plan and the CIG Plan admit that KMH stock is  
3 not and has not been readily tradable on an established market. The remaining  
4 allegations of this paragraph do not state facts, but rather state legal conclusions  
5 that require no response. To the extent that a response is required, KMH, the  
6 KMH Plan and the CIG Plan incorporate the relevant provisions of the IRC.

7 46. KMH, the KMH Plan and the CIG Plan are without information  
8 sufficient to form a belief as to the truth or falsity of the allegations in Paragraph  
9 46, and therefore deny these allegations.

10 47. KMH, the KMH Plan and the CIG Plan are without information  
11 sufficient to form a belief as to the truth or falsity of the allegations in Paragraph  
12 47, and therefore deny these allegations.

13 48. KMH, the KMH Plan and the CIG Plan deny the allegations of  
14 Paragraph 48.

15 49. KMH, the KMH Plan and the CIG Plan deny the allegations of  
16 Paragraph 49.

17 50. KMH, the KMH Plan and the CIG Plan are without information  
18 sufficient to form a belief as to the truth or falsity of the allegations in Paragraph  
19 50, and therefore deny these allegations.

## 20 ANSWER TO CLASS ALLEGATIONS

21 51. KMH, the KMH Plan and the CIG Plan admit that Plaintiffs are  
22 seeking to bring their alleged claims on behalf of a class of persons who are  
23 currently or have been beneficiaries or participants in the KMH ESOP since  
24 October 13 1998. Except as otherwise admitted, KMH, the KMH Plan and the  
25 CIG Plan specifically deny the allegations of Paragraph 51, including the  
26 allegation, express or implied, that Plaintiffs have satisfied the statutory and  
27

1 procedural requirements for class treatment under Fed. R. Civ. P. 23(a) or (b).

2 52. KMH, the KMH Plan and the CIG Plan admit that as of December  
 3 31, 2004, there were over 2500 participants in the KMH Plan. Except as otherwise  
 4 admitted, KMH, the KMH Plan and the CIG Plan deny the allegations of  
 5 Paragraph 52.

6 53. KMH, the KMH Plan and the CIG Plan deny the allegations of  
 7 Paragraph 53.

8 54. KMH, the KMH Plan and the CIG Plan deny the allegations of  
 9 Paragraph 54.

10 55. KMH, the KMH Plan and the CIG Plan deny that Plaintiffs will  
 11 fairly and adequately represent the interest of the Plaintiff Class. KMH, the KMH  
 12 Plan and the CIG Plan are without information sufficient to form a belief as to the  
 13 truth or falsity of the remaining allegations in Paragraph 55 and therefore deny  
 14 these allegations.

15 56. KMH, the KMH Plan and the CIG Plan deny the allegations of  
 16 Paragraph 56.

17 57. KMH, the KMH Plan and the CIG Plan deny the allegations of  
 18 Paragraph 57.

19 58. KMH, the KMH Plan and the CIG Plan are without knowledge or  
 20 information sufficient to form a belief as to the truth or falsity of the allegations in  
 21 Paragraph 58, and therefore deny these allegations.

22 **ANSWER TO ALLEGATIONS REGARDING FIRST CLAIM FOR RELIEF**

23 59. KMH, the KMH Plan and the CIG Plan incorporate the responses to  
 24 the allegations of Paragraphs 1 through 58, inclusive, as though fully set forth  
 25 herein.

26 60. The allegations of Paragraph 60 state legal conclusions, to which no  
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1 response is required. To the extent a response is required, KMH, the KMH Plan  
 2 and the CIG Plan incorporate the relevant provisions of ERISA § 404.

3 61. The allegations of Paragraph 61 state legal conclusions, to which no  
 4 response is required. To the extent a response is required, KMH, the KMH Plan  
 5 and the CIG Plan incorporate the relevant provisions of ERISA § 409.

6 62. The allegations of Paragraph 62 state legal conclusions, to which no  
 7 response is required. To the extent a response is required, KMH, the KMH Plan  
 8 and the CIG Plan incorporate the relevant provisions of ERISA § 502.

9 63. The allegations of Paragraph 63 state legal conclusions, to which no  
 10 response is required. To the extent a response is required, KMH, the KMH Plan  
 11 and the CIG Plan incorporate the relevant provisions of ERISA § 502.

12 64. KMH, the KMH Plan and the CIG Plan deny the allegations of  
 13 Paragraph 64.

14 65. The allegations of Paragraph 65 state legal conclusions, to which no  
 15 response is required. To the extent an answer is required, KMH, the KMH Plan  
 16 and the CIG Plan deny the allegations of paragraph 65 insofar as they assert,  
 17 expressly or impliedly, that any Defendant Fiduciary has acted or failed to act so as  
 18 to incur “co-fiduciary” liability, and incorporate the relevant provisions of ERISA  
 19 § 404 and § 405.

20 66. KMH, the KMH Plan and the CIG Plan deny the allegations of  
 21 Paragraph 66.

22 **ANSWER TO ALLEGATIONS REGARDING SECOND CLAIM FOR**  
 23 **RELIEF**

24 67. KMH, the KMH Plan and the CIG Plan incorporate the responses to  
 25 the allegations of Paragraphs 1 through 58, inclusive, as though fully set forth  
 26 herein.

OF COUNSEL TO:  
 BARTKO, ZANKEL, TARRANT & MILLER P.C.

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1           68. The allegations of Paragraph 68 state legal conclusions, to which no  
2 response is required. To the extent a response is required, KMH, the KMH Plan  
3 and the CIG Plan incorporates the relevant provisions of ERISA § 406.

4           69. The allegations of Paragraph 69 state legal conclusions, to which no  
5 response is required. To the extent a response is required, KMH, the KMH Plan  
6 and the CIG Plan incorporate the relevant provisions of ERISA § 406.

7           70. The allegations of Paragraph 70 state legal conclusions, to which no  
8 response is required. To the extent a response is required, KMH, the KMH Plan  
9 and the CIG Plan incorporate the relevant provisions of ERISA § 408 and ERISA  
10 § 3(18)(B), their legislative history and attendant case law.

11           71. KMH, the KMH Plan and the CIG Plan deny the allegations of  
12 Paragraph 71.

13           72. KMH, the KMH Plan and the CIG Plan deny the allegations of  
14 Paragraph 72.

15           73. KMH, the KMH Plan and the CIG Plan deny the allegations of  
16 Paragraph 73.

17           74. The allegations of Paragraph 74 state legal conclusions, to which no  
18 response is required. To the extent a response is required, KMH, the KMH Plan  
19 and the CIG Plan incorporate the relevant provisions of ERISA § 409.

20           75. The allegations of Paragraph 75 state legal conclusions, to which no  
21 response is required. To the extent a response is required, KMH, the KMH Plan  
22 and the CIG Plan incorporate the relevant provisions of ERISA § 502.

23           76. The allegations of Paragraph 76 state legal conclusions, to which no  
24 response is required. To the extent a response is required, KMH, the KMH Plan  
25 and the CIG Plan incorporate the relevant provisions of ERISA § 502.

26           77. KMH, the KMH Plan and the CIG Plan deny the allegations of  
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28

1 Paragraph 77.

2 78. KMH, the KMH Plan and the CIG Plan deny the allegations of

3 Paragraph 78.

4 79. The allegations of Paragraph 79 state legal conclusions, to which no  
 5 response is required. To the extent an answer is required, KMH, the KMH Plan  
 6 and the CIG Plan deny the allegations of paragraph 79 insofar as they assert any  
 7 Defendant Fiduciary has acted or failed to act so as to incur "co-fiduciary" liability  
 8 and incorporate the relevant provisions of ERISA § 404 and § 405.

9 **ANSWER TO PRAYER FOR RELIEF**

10 KMH, the KMH Plan and the CIG Plan deny that Plaintiffs are entitled to  
 11 judgment or any of the relief requested in paragraphs A through I as to the First  
 12 Claim for Relief and paragraphs A through K as to the Second Claim for Relief, or  
 13 that Plaintiffs are entitled to any relief whatsoever.

14 **SEPARATE AND ADDITIONAL DEFENSES**

15 **FIRST SEPARATE AND ADDITIONAL DEFENSE**

16 **(Failure to State a Claim)**

17 The Complaint, and each purported cause of action therein, fails to state a  
 18 claim on which relief may be granted.

19 **SECOND SEPARATE AND ADDITIONAL DEFENSE**

20 **(Statute of Limitations)**

21 The Complaint, and each alleged claim therein, is barred by the statute of  
 22 limitations.

23 **THIRD SEPARATE AND ADDITIONAL DEFENSE**

24 **(Estoppe)**

25 Plaintiffs are estopped from obtaining the relief sought in the Complaint by  
 26 their own acts, statements, conduct and omissions.

**FOURTH SEPARATE AND ADDITIONAL DEFENSE****(Failure to Plead With Particularity)**

Plaintiffs fail to plead their allegations of fraud and concealment with the requisite particularity.

**FIFTH SEPARATE AND ADDITIONAL DEFENSE****(Reasonable Business Judgment)**

All defendants exercised reasonable business judgment in connection with the transactions alleged in the Complaint.

**SIXTH SEPARATE AND ADDITIONAL DEFENSE****(Lack of Causation)**

No act or omission of KMH, the KMH Plan and the CIG Plan caused or contributed to Plaintiffs' alleged harm and damage, if any.

**SEVENTH SEPARATE AND ADDITIONAL DEFENSE****(Mitigation of Damages)**

Plaintiffs at all times at issue in the Complaint failed to take any or all actions reasonable or necessary under the circumstances to avoid or reduce their alleged damages, if any, and, to the extent of such failure to mitigate, Plaintiffs' claims are barred.

**EIGHTH SEPARATE AND ADDITIONAL DEFENSE****(Reservation of Rights)**

KMH, the KMH Plan and the CIG Plan have insufficient knowledge or information upon which to form a belief as to whether it may have as yet unstated separate and additional defenses available. KMH, the KMH Plan and the CIG Plan thus reserve the right to amend this Answer to add, delete, or modify defenses based upon legal theories which may or will be disclosed through discovery, or clarification or analysis of Plaintiffs' claims.

**LOVITT & HANNAN, INC.**  
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 (415) 362-8769

OF COUNSEL TO:  
 BARTKO, ZANKEL, TARRANT & MILLER P.C.

1 WHEREFORE, KMH, the KMH Plan and the CIG Plan pray for judgment,  
 2 as follows:

- 3 1. That the Complaint be dismissed and/or that Plaintiffs take nothing  
 4 by reason of their Complaint;
- 5 2. For costs of suit; and
- 6 3. For such other and further relief as this Court deems just and  
 7 proper.

8 **CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

9 Pursuant to Civil L.R. 3-16, the undersigned certifies that the following  
 10 listed persons, associations of persons, firms, partnerships, corporations (including  
 11 parent corporations) or other entities (i) have a financial interest in the subject  
 12 matter in controversy or in a party to the proceeding, or (ii) have a non-financial  
 13 interest in that subject matter or in a party that could be substantially affected by  
 14 the outcome of this proceeding: William E. Moore Marital Trust; Desiree B.  
 15 Moore Revocable Trust; K-M Industries Holding Co., Inc. ESOP Plan and the  
 16 Plan's Participants; Desiree B. Moore; William Moore II; Christine McCall;  
 17 Steven DeVoe; Peter Cazzolla; Capital Insurance Group; and Kelly-Moore Paint  
 18 Company.

19 DATED: March 5, 2007

LOVITT & HANNAN, INC.

20 21 22 23 24 25 26 27 28  
 By: 

Ronald Lovitt  
 J. Thomas Hannan  
 Henry I. Bornstein

Attorneys for Defendants K-M Industries  
 Holding Co., Inc.; K-M Industries Holding Co.  
 Inc. ESOP Plan Committee; and CIG ESOP Plan  
 Committee